Kho Whai Phiaw v Chong Chieng Jen

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)–22 OF 2008(Q)
ALAUDDIN PCA, NIK HASHIM AND ZULKEFLI FCJJ
10 MARCH 2009

Election — Petition — Challenge to validity of election candidate — Application for declaration that election null and void — Allegation of corrupt practice of undue influence and bribery — Appeal against — Election Offences Act 1954 — Failure to plead s 11(1)(b) — Whether mandatory requirement for election petition complied — Whether election petition fundamentally defective — Whether allegations substantiated — Whether charges should be dismissed

In the Parliamentary elections held on 8 March 2008, the respondent, from the Democratic Action Party (DAP), had won the seat for the constituency of Bandar Kuching (P195). He defeated Mr Sim Yaw Yen from the Sarawak United Peoples Party (SUPP) by a majority of 9,952 votes. The appellant, an elector in the Bandar Kuching constituency, being unhappy with the result, had presented a petition to the Election Court to have the respondent's election declared void allegedly on the ground that the respondent had, in procuring his victory in the said election, engaged in corrupt practice. The appellant had levelled five charges against the respondent in his petition; four of which related to the alleged use of undue influence while one charge related to the alleged bribery of voters in the constituency. At the close of the hearing, the election judge 'EJ' held that the alleged corrupt practice of undue influence and bribery were not proved by the appellant and accordingly dismissed the petition with costs. Hence, the present appeal by the appellant. The appellant contended, inter alia, that the EJ had erred in law and in fact when he held that the appellants' failure to plead s 11(1)(b) of the Election Offences Act 1954 rendered all the charges specified in paras 3(1), 3(2), 3(3), 3(4) and 3(5) of the election petition fundamentally defective and the charges should be dismissed on that ground alone.

Held, dismissing the appeal with costs:

(1) The EJ was absolutely right to hold that the charges were fundamentally defective and they should be dismissed on that ground alone. Without the reliance on s 11 which makes bribery an offence of corrupt practice, there was an essential missing link between s 10(a) and s 32(c) because

s 10(a) merely defined bribery, and it was s 32(c) which enacted corrupt practice as a ground to avoid the election. To make good a charge under s 32(c) which concerns corrupt practice, s 11 was therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action. The proceedings in an election case being quasi-criminal in character, the burden of proof on the petitioner was a heavy one ie, to prove beyond reasonable doubt (see paras 17, 18 & 50).

(2) In this appeal, the EJ had heard all the evidence before him, seen the demeanour of all the witnesses at the trial, considered all the facts very carefully and thoroughly and subsequently, applied the law and principle correctly. The EJ was right to find that all the charges were not proved beyond reasonable doubt against the respondent and that the election petition should be dismissed with costs (see paras 50 & 54).

(3) The mere fact that the appellate court would have come to a different conclusion after appreciating the evidence, was not a ground for interference unless the conclusion of the lower court was so perverse or basically faulty or contrary to law resulting in a miscarriage of justice, which was not the case here. In short, the EJ had not misdirected himself in law and in fact and his decision was plainly sound. In the premises, his findings and conclusion in this appeal should not be interfered with (see paras 50 & 51).

[Bahasa Malaysia summary

Dalam pilihan raya Parliamen yang diadakan pada 8 Mac 2008, responden, daripada 'Democratic Action Party' (DAP), telah memenangi kerusi untuk bahagian pilihanraya Bandar Kuching (P195). Dia mengalahkan Mr Sim Yaw Yen daripada 'Sarawak United Peoples Party' (SUPP) dengan majoriti 9,952 undi. Perayu, seorang pemilih dalam bahagian pilihanraya Bandar Kuching, menjadi tidak gembira dengan keputusan tersebut, telah mengemukakan satu petisyen kepada Mahkamah Pilihan Raya untuk mengisytiharkan pemilihan responden sebagai tidak sah dengan mengatakan bahawa responden telah, dalam memperolehi kemenangannya dalam pilihan raya tersebut, melibatkan diri dalam amalan rasuah. Perayu telah membuat lima tuduhan terhadap responden dalam petisyennya; di mana empat daripadanya berkaitan dengan pengataan penggunaan pengaruh tak wajar manakala satu pertuduhan berkaitan dengan dakwaan sogokan para pengundi dalam bahagian pilihanrayanya. Di akhir perbicaraan, Hakim Pilihan Raya 'HP' memutuskan bahawa dakwaan amalan korup iaitu pengaruh tak wajar dan sogokan tidak dibuktikan oleh perayu dan petisyen ditolak dengan kos. Maka, rayuan ini oleh perayu. Perayu menyatakan, antara lain, bahawa HP telah khilaf dari segi undang-undang dan fakta apabila beliau memutuskan bahawa kegagalan

perayu untuk memplidkan s 11(1)(b) Akta Kesalahan-Kesalahan Pilihan Raya 1954 menyebabkan semua tuduhan-tuduhan yang dinyatakan perenggan 3(1), 3(2), 3(3), 3(4) dan 3(5) petisyen pilihan raya cacat pada dasarnya dan ia sepatutnya ditolak semata-mata atas alasan tersebut..

Diputuskan, menolak rayuan dengan kos:

(1) HP sememangnya betul dalam memutuskan bahawa pertuduhan-pertuduhan adalah cacat pada dasarnya dan ia sepatutnya ditolak semata-mata atas alasan tersebut. Tanpa pergantungan kepada s 11 yang menjadikan sogokan satu kesalahan amalan rasuah, terdapat satu hubungan penting yang hilang antara s 10(a) dan s 32(c) kerana s 10(a) hanya mendefinasikan sogokan, dan s 32(c) yang menjadikan amalan rasuah satu alasan untuk mentaksahkan pilihanraya itu. Untuk menjadikan sesuatu tuduhan betul di bawah s 32(c) Akta berkaitan dengan perbuatan rasuah, s 11 Akta adalah merupakan, suatu keperluan mandatori untuk menyediakan pelengkap penghubung asas untuk membentuk kausa tindakan itu. Prosiding dalam sesuatu kes pilihanraya yang bersifat quasi penal, beban pembuktian ke atas pempetisyen adalah berat iaitu, bagi membuktikannya melampaui keraguan munasabah (lihat perenggan 17, 18 & 50).

(2) Dalam rayuan ini, HP telah mendengar semua bukti di hadapannya, melihat tingkah laku saksi-saksi semasa perbicaraan, mempertimbangkan semua fakta-fakta dengan sangat berhati-hati dan teliti dan kemudiannya, mengaplikasi undang-undang dan prinsip-prinsip dengan sewajarnya. HP adalah betul untuk mendapati bahawa semua pertuduhan-pertuduhan tidak dibuktikan melampaui keraguan yang munasabah terhadap responden dan petisyen pilihan raya sepatutnya ditolak dengan kos (lihat perenggan 50 & 54).

(3) Fakta semata-mata bahawa mahkamah rayuan pasti akan mencapai satu kesimpulan lain selepas menghargai bukti, bukanlah satu alasan untuk mengganggu melainkan kesimpulan mahkamah rendah adalah amat tidak munasabah atau pada asasnya salah atau bertentangan dengan undang-undang yang mengakibatkan salah laksana keadilan, yang mana bukan kesnya di sini. Kesimpulannya, HP tidak menyalaharahkan dirinya dalam undang-undang dan fakta dan keputusannya adalah nyata betul. Atas premis ini, keputusan beliau nyata betul dan tidak seharusnya diusik (lihat perenggan 50 & 51).]

Notes

For cases on challenge to validity of election candidate, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2020–2021.

Cases referred to

Ali Amberan v Tunku Abdullah [1970] 2 MLJ 15, HC (refd)
Allah Dad Khan v Soofi Abdul Hamid Khan (1966) IEC Vol 1 (refd)
Bankabehari Das v Chittaranjan Naik AIR 1963 Odissa 83 (refd)
B Rajgopal Rao & Anor v Appayya Dora Hanomanthu AIR 1990 SC 2890, SC (refd)
Chandrakauta Goyal v Sohan Singh AIR 1996 SC 861 (refd)
DP Mishra v Kandnarayanan Sharma & Ors AIR 1971 SC 856 (refd)
Fung Kong Win v Yee Moh Chai [2005] 3 MLJ 86, HC (refd)
Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729, FC (refd)
Harjit Singh Manu v S Umrao Singh and Ors AIR 1980 SC 701 (refd)
Linge Gowde v Shivanajappa (1953) 6 ELR 288 (refd)
North Gaya (Gen) Rural Constituency, Jaduandran v Mosahib Singh ECD Vol 1 (refd)
Pengkalan Kota By-Election, Teoh Teik Huat, Re v Lim Kean Siew & Anor [1981] 1 MLJ 265, HC (refd)
Prof Ramchandra G Kapse v Haribansh Ranakbal Singh AIR 1996 SC 817 (refd)
Radhakantan Mishra v Nityananda Mahapatra & Anor 19 ELR 205 (refd)
Sadhir Laxman Hendre v SA Dauge 17 ELR 373 (refd)
Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor [1988] 2 MLJ 384, HC (refd)

Legislation referred to

Election (Conduct of Elections) Regulations 1981 Reg 4(3), 11g
Election Offences Act 1954 ss 3(1)(m), 4A, 9(1), 10, 10(a), 11, 11(1), (b), 32(c), 123(1)(a)

Appeal from: Election Petition No EP-26–01 of 2008–1 Parliament Constituency of Bandar Kuching (P195) 28 April 2008 (Election Court, Kuching).

Henry Ling Kwong Meng (Ling & Wong) for the appellant.
Wong Ho Leng (Alvin Yong, Chong Siew Chiang and Chan Kok Keong with him) (Chong Brothers) for the respondent.

Alauddin PCA (delivering judgment of the court):

[1] In the Parliamentary elections held on 8 March 2008, two (2) candidates offered themselves for election in the constituency of Bandar Kuching (P195). They were Mr Sim Yaw Yen and Mr Chong Chieng Jen ('the respondent'). Mr Sim represented the Sarawak United Peoples Party or SUPP which is a member of the coalition of political parties known as the Barisan

Nasional or BN which forms the government in Malaysia including the state government in Sarawak. The respondent represented the Democratic Action Party or DAP, an opposition party in Malaysia. The respondent was in fact offering himself for re-election as he was the Member of Parliament for Bandar Kuching in the last Parliament before its dissolution.

[2] In the event, the respondent won the Bandar Kuching seat. He received 22,901 votes against Mr Sim's 12,949 votes. The respondent's majority was thus 9,952 votes.

[3] An elector in the Bandar Kuching Constituency, one Mr Kho Whai Phiaw ('the appellant') being unhappy with the above result has presented a petition to the Election Court to have the respondent's election declared void.

[4] The appellant seeks to have the respondent's election avoided on the ground that the latter had engaged in the corrupt practice of (i) undue influence and (ii) bribery, to procure his victory in the election. In all the appellant has levelled five (5) charges against the respondent in his petition; four (4) of which relate to the alleged use of undue influence while one (1) charge relates to the alleged bribery of voters in the constituency.

[5] At the close of the hearing of the petition, the learned election judge 'LEJ' held that the alleged corrupt practice of undue influence and bribery were not proved by the appellant and the petition was dismissed with costs on 24 September 2008. Hence the present appeal before us.

GROUNDS OF APPEAL

[6] Before us, the LEJ's decision was attacked on the following grounds:

Pleadings

(1) The learned trial judge erred in law and fact when he held that the appellant's failure to plead s 11(1)(b) of the Election Offences Act 1954 renders all the charges specified in paras 3(1), 3(2), 3(3), 3(4) and 3(5) of the election petition fundamentally defective and in which these charges should be dismissed on that ground alone.

(2) The learned judge drew wrong inferences from the evidence adduced in concluding that the appellant's witnesses were interested or partisan witnesses and thereby failed to give due or proper weight or consideration to their evidence.

(3) The learned judge erred by failing to properly and critically evaluate the evidence given by the respondent himself and accepted the same without corroboration and thereby occasioning a miscarriage of justice in dismissing the election petition.

(4) The learned trial judge erred in law and fact in reaching the decision which defeats and frustrates the very laudable and sacrosanct object of the Election Offences Act 1954.

Charge No 1

(5) Having rightly found that the respondent was the owner of his personal blog (Chong Chieng Jen's blog), the learned judge wrongly concluded that he was not the publisher of the impugned Smith's article ('exh P3') on his website and that the learned judge wrongly concluded that Smith's article was in the respondent's blog with neither his knowledge nor consent.

(6) The learned trial judge erred in law and fact when he held that the appellant has failed to prove the charge of corrupt practice of undue influence set out in para 3(1) of the election petition. After ruling, the learned judge failed to apply the correct test to determine whether any of the voters in the Bandar Kuching constituency or PW1 or PW3 had been induced to vote or refrain from voting by the contents of the impugned Smith's article within the meaning of s 10(1) of the Election Offences Act 1954.

Charge No 2

(7) The learned trial judge erred in law and fact when he held that the contents of a pamphlet entitled '*After 50 Years of Independence*...' (exhs 4, 12 or 30) were in substance political statements which should not have affected the mind of the appellant or the ordinary average Chinese non-Muslim voter in the Bandar Kuching constituency.

(8) The learned trial judge erred in law and fact when he held that the whole evidence of the appellant's witness, PW3 (Madam Wong Choon Lee) is irrelevant and inadmissible.

Charge No 3

(9) The learned trial judge erred in law and fact when he held that the pleading of the '*DAP 2008 ELECTION MANIFESTO*' being referred to is the DAP national manifesto launched at DAP headquarters on 25 February 2008 and not the Sarawak DAP manisfeto saying that 'DAP 2008 ELECTION MANIFESTO' (exhs P5, P11 and P14) did not even exist on that date and it was not a part of the appellant's pleaded

case that the voters were induced by what was stated in these exhibits under the same title of 'DAP 2008 ELECTION MANIFESTO' and that it was a case different from what was pleaded that the appellant was not able to rely on the evidence of these exhibits (exhs P5, P11 and P14).

(10(a)) The learned trial judge erred in law and fact in rejecting the evidence of the appallent PW1, and other witnesses PW2 (Medrict Jukai AK Empaka) and PW4 (Supramaniam a/l Raman) in support of the charge of corrupt practice under para 3(3) of the election petition and in holding that these witnesses were induced to vote or refrained from voting by the promise of RM6,000 stated in the DAP 2008 ELECTION MANIFESTO (exhs P5, P11 and P14) they each received.

(10(b)) The learned judge ought not to have accepted evidence of the respondent which were all self-serving explanations and personal opinions of the respondent without any corroboration at all.

(11) The learned trial judge erred in law and fact when he held that the promise of bonus of RM6,000 for those with household income of RM6,000 or less per annum in the manifesto was a declaration to the general public of Sarawak in respect of DAP's public policy or promise of public action and that it cannot constitute any bribery, and in which the learned trial judge said '*the promise in the manifesto so clearly calls for public action which will benefit the public as a whole in Sarawak*', '*not one where individual or personal advantage can be obtained*', '*the public promise was made for the benefit of all voters and not just for voters in Bandar Kuching nor was it a promise by Chong Chieng Jen the respondent personally*', '*there is no suggestion that the RM6,000 would be paid by the respondent to the voters from his personal funds*', '*there is no reason why he should pledge his personal fortune in exchange for votes of other constituencies*', the '*manifesto was clearly meant for the benefit of the Sarawak DAP party as a whole and nor did it make the promise of the RM6,000 on condition that the voters vote for the respondent*', etc.

(12) The learned trial judge erred in law and fact when he held that there was no element of bargaining in the promise of RM6,000 between the respondent and the voters in Bandar Kuching constituency despite the clear and cogent evidence which showed that at least one voter was induced to vote or refrained from voting in the election by the said promise.

Charge No 4

(13) The learned trial judge erred in law and fact when he held that on the contents of the pamphlet '*CORRUPTION — OUR NO 1 ENEMY!*' ('exh P6'), it *cannot* be said that the act of corrupt practice was

committed by the candidate or with the candidate's knowledge or consent and that it was committed in connection with the election, there being no candidate within the meaning of s 32(c) of the Election Offences Act 1954 until the nomination day, 24 February 2008, despite the fact that the respondent had disregarded the law and contravened s 10(1) of the Election Offences Act 1954.

(14) The learned trial judge erred in law and fact when he failed to hold that the respondent by publishing the pamphlet '*CORRUPTION — OUR NO 1 ENEMY!*' (exh P6) he had committed an offence of corrupt practice of undue influence under s 10(1) of the Election Offences Act 1954 and by reason whereof his election ought to be avoided under s 32(c) of the Election Offences Act 1954.

Charge No 5

(15) The learned trial judge erred in law and fact when he held that it was the appellant's pleaded case that the pamphlet entitled '*SAY 'ENOUGH IS ENOUGH' TO SUPP, SAY 'NO' TO CM!!!*' (exh P8) containing misleading imputations against Mr Sim Yaw Yen so as to induce or compel the voters to vote for the respondent whereas the appellant's pleaded case was that the contents of exh P8 had indirectly interfered or attempted to interfere with the free exercise of the electoral rights by the voters in the said constituency or the respondent or with his knowledge or consent published the statements containing misleading imputations against the said SIM YAW YEN in exh P8.

(16) The learned trial judge erred in law and fact when he held that the evidence adduced by the appellant on the charge of corrupt practice of undue influence in para 3(5) of the election petition is totally irrelevant to the charge pleaded in the said para 3(5) and cannot be acted on.

Grounds 1–4

[7] The complaint is that the LEJ erred in law and in fact when he held that the appellants' failure to plead s 11(1)(b) of the Election Offences Act 1954 ('the Act') renders all the charges specified in paras 3(1), 3(2), 3(3), 3(4) and 3(5) of the election petition fundamentally defective and the charges should be dismissed on that ground alone (see AR p 32 L23–28).

[8] In dealing with the above complaint we feel it is appropriate that the reasoning and evaluation of the matter by the LEJ in his judgment be referred to.

[9] At p 29 of the appeal record this is what the LEJ had said: A

> Counsel for the respondent contends that while s 9(1) and s 10(a) of the Act define the offence of undue influence and bribery respectively, it is s 11 (1)(b) of the Act which makes undue influence and bribery the offence of corrupt practice. Therefore to constitute a complete cause of action on the ground of corrupt practice in this case, the petitioner must plead the requisite sections, namely, s 9(1) or s 10(a) and s 11(1)(b) and s 32(c) since they are relevant sections which define the particular type of corrupt practice complained of, makes the particular offence a corrupt practice, and which allows for the avoidance of the election on that ground. Since the petitioner did not do so the respondent contends that all the charges in the petition have been rendered incomplete and defective and so the Election Petition should be dismissed for failing to comply with the strict requirements of r 4(1)(b) of the Election Petition Rules 1954 which requires an election petition to 'briefly state the facts and grounds relied on to sustain the prayer'. B C D

[10] The LEJ continued:

> Dato' Muhammad Shafee bin Abdullah of counsel for the petitioner denies that the election petition is defective as alleged. He contends that s 11 of the Act is totally irrelevant in an election petition because s 11 would only apply if there has been a prosecution instituted under the section and a conviction obtained. Learned counsel contends that a reading of s 11 shows that that section only becomes relevant if a person has been convicted by a Sessions Court of a corrupt practice in which event, the very serious consequences stated in the section will flow. E F

I do not agree with Dato' Shafee Abdullah. I find that counsel for the respondent is correct in the position he has taken on s 11. I say so for the following reasons.

It is central to the reasoning of the respondent that while s 9(1) and s 10(a) define the offence of undue influence and bribery respectively, it is s 11(1)(b) that makes those two (2) offences an offence of corrupt practice. To determine the correctness of this argument it will be helpful to see what these three (3) sections say in their relevant parts. G

[11] The LEJ then went on to examine all the three (3) sections in their relevant parts and continued: H

> It will be immediately noticed that whilst these sections ie s 9(1) and s 10(a) define the offence of undue influence and bribery (and the same is also true of s 7 and s 8 which define the offence of personating and treating respectively) which are categorised as 'corrupt practices' under the heading found in Part 111 of the Act, there is nothing stated in these sections which constitutes or makes them an offence of corrupt practice. For that, one has to read s 11 of the Act. I

[12] Having referred to s 11 the LEJ concluded thus:

> Now, while it is true as Dato' Shafee Abdullah has said that s 11 comes into play when there has been a conviction for a corrupt practice, it does not follow that that is the only occasion when the section comes into play. It is important to note that it is s 11(1)(b) that makes the offence of treating, undue influence or bribery a corrupt practice. It is equally important to note that even though a person is not prosecuted and convicted of a corrupt practice under the section, s 11(1)(b) states that every person who merely commits (as opposed to being convicted of) the offence of treating, undue influence or bribery shall be guilty of a corrupt practice.

[13] Further, the LEJ continued:

> And a reading of s 32 of the Act shows that on that basis an election petition can be presented to avoid the election under s 32(c). It is for this reason that I do not agree with Dato' Shafee Abdullah that s 11 is irrelevant to an election petition. On the contrary, in a case such as this, where the alleged corrupt practice is the only basis or ground relied on by the petitioner to avoid the election, since it is s 11(1)(b) that makes undue influence and bribery a corrupt practice, upon which ground the respondent's election may be avoided, the petitioner's failure to plead s 11(1)(b) renders the charges defective and incomplete. The petitioner has failed to relate the complaints with the provisions of the election laws the respondent is alleged to have transgressed (see *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384). This has rendered the election petition so fundamentally defective that it should be dismissed on this ground alone. In case I am wrong in what I say: I now go on to consider the charges.

[14] The principle enunciated in the case of *Wan Daud* cited by the LEJ was referred to and approved by the Federal Court in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 at p 744.

[15] In *Gan Joon Zin*, the Federal Court speaking through Abdul Hamid Mohamad FCJ (as he then was) had this to say:

> The learned judge said:
>
> > In *Wan Daud bin Wan Jusoh*, at p 388 para F left, Wan Yahya J (later SCJ) held that a petition under r 4 must not only narrate the facts complained of but must relate or associate the complaints with the provision of election laws alleged to have been transgressed, there is undoubtedly a failure to comply with r 4(1)(b).
>
> In my view, the petitioner's reliance on s 24B and s 32(b) and (c) is therefore clearly untenable. We agree with him.

[16] In *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15 at p 18 the court held that in an election petition to avoid an election based on s 3(1)(m) of

the Act, s 11 cannot also be overlooked. See also *Re Pengkalan Kota By-Election* [1981] 1 MLJ 265 at p 267 where the court took into consideration ss 10(a), 11(1) and s 32(c) of the Act.

[17] Having said the above we are of the opinion that the LEJ is absolutely right to hold that the charges were fundamentally defective and they should be dismissed on that ground alone. We agree with the LEJ.

[18] Without the reliance on s 11 which makes bribery an offence of corrupt practice, there is an essential missing link between s 10(a) and s 32(c) because s 10(a) merely defines what is bribery, and it is s 32(c) which enacts corrupt practice as a ground to avoid the election. To make good a charge under s 32(c) which concerns corrupt practice, s 11 is therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action.

[19] Based on the facts in this appeal we have no reason to disagree with the LEJ on this point. As did the LEJ we would also consider the other grounds of appeal.

Grounds 5–6, (Charge 1) (Evidence of PW1, PW9, PW12 and PW14)

[20] At p 39 of the appeal record this is what the LEJ said in respect of these grounds:

> Although the petitioner contends that the respondent was the publisher of Mr Smith's article or that it must be inferred that he published it, the facts show otherwise. It is clear to me from looking at that page of the respondent's blog which was produced in court that the person who posted Mr Smith's letter to the respondent's blog on 6 March 2008 at 2.30pm was one 'Responsible Christian Voter' (RCV). Mr Smith was the author of the letter and it was RCV who published that letter through the respondent's blog site, and not the respondent as alleged... They are strangers to the respondent... And as I indicated earlier, it was not even alleged that RCV or Smith are agents of the respondent. Accordingly, I find that the respondent had not published Mr Smith's article as alleged.
>
> A relevant question connected to this issue is whose duty is it to establish the element of knowledge? ...
>
> Knowledge and consent is a question of fact in every case ... Did the respondent know that Mr Smith's article had been posted to his blog and did he consent to it being there? ...
>
> The evidence shows that Mr Smith's article was posted on 6 March 2008 at 2.30pm and polling day was on 8 March 2008. So, if the respondent was to have knowledge of the article it would have to be between these two or three days. But

A the respondent testified that between those two or three days he was so busy canvassing that he had no time to visit his blog. I accept the evidence of the respondent on this point.

B **[21]** It must be emphasised here that what we have quoted above are findings of fact made by the LEJ. We will be mentioning a bit more on the issue of findings of fact later in the judgment. But for now we would only say that we agree with and accept his findings of fact as we find that they are proper and reasonable.

C

[22] As regards the evidence of PW1 (the 'appellant') the LEJ held that PW1 did not fully understand Mr Smith's article and the LEJ disbelieved PW1's evidence. According to PW1 he read the article on the respondent's website on 26 or 27 of February 2008 but the evidence shows that the said D article was not posted to the website until 6 March 2008 at 2.30pm. Therefore the LEJ was right in holding that PW1 could not have read the article on 26 or 27 February 2008.

[23] On the question whether the impugned part of Mr Smith's article E contained 'such threatening statements' which could 'create fear and terror in the mind of voters in Bandar Kuching' this is what the LEJ said in his judgment (at pp 47–48 of the appeal record):

> ln the first place, nowhere in the impugned part of Mr Smith's article did it call F upon voters to vote for the respondent whether on religious grounds or otherwise, or refrain from voting for Sim Yaw Yen.
>
> ... There is no evidence that Mr Smith is known to the voters in Bandar Kuching, Christians or otherwise, or that he had any disciple in Kuching ...
>
> G So, it can be seen that the article has no direct connection with the respondent's election on religious grounds ... There is nothing in the article to appeal for votes for the respondent on grounds of religion, neither an appeal that Christian must vote Christian or anything of that sort. There is no statement in Mr Smith's article to warrant a conclusion that there was any threat of divine displeasure or spiritual censure. There was no threat of evil consequence at all in Mr Smith's article, and H no threats of injury too.

[24] Again, as we have stated earlier these are finding's of fact by the LEJ. We have no reason to disagree with him.

I

Grounds 7–8 (Charge 2) (PW1, PW 3 & PW10)

[25] The issue here is whether the publication and circulation of the statements contained in the pamphlet entitled 'AFTER 50 YEARS OF

INDEPENDENCE ...'. Exhibits P4 or P8, P12, P30 had inflicted fear so as to induce the voters in P195 to vote for the respondent at the said election. A

[26] Having scrutinised the LEJ's judgment and reasoning on this issue we support the LEJ's finding that the ordinary average Chinese and non-Muslim voters in P195 were not unduly influenced to vote for the DAP and we found that the LEJ after having carefully considered the evidence of PW1, PW3 and PW10 respectively was right in concluding that the appellant had failed to prove otherwise. We agree with the findings of the LEJ. B

[27] As regards the photograph of a politician holding the 'keris' in exhs P4 or (P8, P12 & P30) which is the main complaint of the appellant, the LEJ held that the photograph cannot be held to be an interference or attempt to interfere with the free exercise of any electoral right or intending or to have the effect of creating fear in the minds of the voters in order to exercise their electoral right in favour of the respondent. The LEJ cited *Sadhir Laxman Hendre v SA Dauge* 17 ELR 373 at p 412 to support his finding. We agree with his finding. C D

[28] The LEJ had perused the contents of exh P4 (see p 53 of the appeal record) and found that they were mere political statements and political appeals to voters to support DAP. The appellant had admitted that the contents of the pamphlet, exh P4, had already been made known to him and the general public long before its publication and they were true. E

[29] In the premises, we find that the LEJ rightly held that the statements in exh P4 could not have interfered with or attempted to interfere with the free exercise of the appellant's electoral right. F

[30] It was held in *Radhakantan Mishra v Nityananda Mahapatra & Anor* 19 ELR 205 at p 234 that when a fact and event had already been made known to everybody (ie on account of police firing), the voters cannot be influenced, and the respondent could not have intended to cause fear in the minds of the voters by publication of the picture of the police firing in order to interfere with the free exercise of their electoral right. G H

[31] With regard to the evidence of Wong Choon Tee (PW3), the LEJ held that her evidence is totally irrelevant and inadmissible regarding the contents of the pamphlet exhs P4 or (P12) (see p 54 of the appeal record). This is because the appellant's case relied mainly on the English version and not the Chinese version of exhs P4 or (P12). It is an undisputed fact that both exhs P4 or (P12) contained both Chinese and English versions and they are materially different. PW3 read only the Chinese version because she could not understand English. Since the appellant's case was pleaded and relied I

A mainly on the English version the LEJ rightly held that PW3's evidence could not be acted upon because parties are bound by their pleadings. This is especially so in an election petition.

B **[32]** The LEJ also found PW3's story to be unreliable and carried little weight. Quite apart from the above, the LEJ also found that her evidence was tailored or she was coached.

C **[33]** For all the reasons the LEJ had given, we agree with him that the second charge had not been proved beyond reasonable doubt against the respondent. The LEJ also rightfully held that the burden of proof was on the appellant and it had not shifted onto the respondent at all in respect of this charge (see *Allah Dad Khan v Soofi Abdul Hamid Khan* (1966) IEC Vol 1 p 63).

D *Grounds 9–12 (Charge 3) (PW1, PW2 & PW4) exh P5 or P11*

E **[34]** This charge related to bribery (s 10) by the respondent in allegedly making a promise in the 'DAP 2008 Election Manifesto (exh P5)' to give voters in P195 'a Malaysian Bonus up to RM6,000 for those with household income of RM6,000 or less per annum' on or about 25 February 2008 in order to induce the voters in P195.

F **[35]** Exhibit P5 is the manifesto of DAP Sarawak which was used in the 2008 Parliamentary elections in Sarawak. It was a declaration of DAP's public policy. This fact was admitted by PW4 (see appeal record p 740). It was not the promise of the respondent personally as alleged in the charge. Thus it is incorrect to say that the respondent made the promise in the manifesto (exh P5). It was a promise made by DAP Sarawak as a whole.

G **[36]** Based on the above facts, we find that the LEJ rightly took the view that the election manifesto of DAP Sarawak (not the respondent's personal manifesto nor his personal promise) could not be treated as the subject matter of corrupt practice. It was conceded by the appellant that the said sum of H RM6,000 was not paid by the respondent personally, but by the government, if there was a change of government.

I **[37]** In *B Rajgopal Rao & Anor v Appayya Dora Hanomanthu* AIR 1990 SC 2890 at p 2891, the Telugu Party promised to give to all the poor people whose income was below Rs 6,000 per year rice and sarees and dhotis at subsidised rate during election time. The offer was made not only in the said constituency but throughout the state. It was held by the Supreme Court that it is only in rare circumstances that such a promise can be said to amount to a corrupt practice of bribery within the meaning of s 123(1)(A) even though

such a promise might be made at the eve of elections (see also *North Gaya (Gen) Rural Constituency, Jaduandran v Mosahib Singh* ECD Vol 1 p 48; *Bankabehari Das v Chittaranjan Naik* AIR 1963 Odissa 83 at p 88 and *Linge Gowde v Shivanajappa* (1953) 6 ELR 288 at p 289).

[38] Going by the appellant's pleadings, the manifesto relied upon by him was the DAP national manifesto launched by Lim Guan Eng at DAP headquarters on 25 February 2008, and not the Sarawak DAP manifesto printed in Sibu and launched by Wong Ho Leng. In the premise, we find that the LEJ was right in rejecting the appellant's evidence based on exhs P5 or (P11 or P14) which was different from what was pleaded in the charge of the election petition. The charge pleaded a different manifesto ie the DAP National Manifesto which was not the same as the Sarawak DAP Manifesto. The DAP National Manifesto was neither used nor circulated by the Sarawak DAP in the said election. Sarawak DAP used its own manifesto (see *Prof Ramchandra G Kapse v Haribansh Ranakbal Singh* AIR 1996 SC 817 at p 826).

[39] Finally, we find that the LEJ was right in his finding that the charge under s 32(c) based on the charge of bribery under s 10(a) of the Act had not been proved beyond reasonable doubt after having seen and heard the evidence of the appellant, PW2 and PW3 and the evidence of the respondent.

Grounds 13–14 (Charge 4) (PW 1) (exh P6)

[40] The charge here is that the respondent had exerted undue influence over the voters in the Bandar Kuching constituency in the manner stated in the petition in that the respondent was alleged to have published or with his knowledge or consent published false statements in a pamphlet or campaign material entitled 'CORRUPTION OUR NO 1 ENEMY', so as to induce the voters to vote for him.

[41] The appellant (PW1) testified in court under cross-examination that he received the pamphlet (exh P6) in his mailbox sometime before the Chinese New Year in 2008. The appellant also agreed that exh P6 had nothing to do with the election. He also conceded that exh P6 had no reference to Mr Sim Yaw Yen (BN candidate).

[42] Having heard the evidence of the appellant the LEJ opined as follows:

> It will be recalled that the petitioner seeks to avoid the respondent's election on this ground under s 32(c) of the Act. To constitute a ground under s 32(c), it is an essential ingredient that the corrupt practice must be committed 'in connection

with the election', and the alleged act must be committed by 'the candidate', or with the 'candidate's' knowledge or consent or by the candidate's agent. Since nomination day fell on 24 February 2008 and the pamphlet (exh P6) was received by PW1 before Chinese New Year on 7 February 2008, I agree with learned counsel for the respondent that it cannot be said that the act of corrupt practice was committed by the 'candidate' or with the 'candidate's' knowledge or consent and that it was committed in 'connection with the election', there being no candidate within the meaning of s 32(c) of the Act until 24 February 2008 which was nomination day. A 'candidate' is defined in s 2 of the Act as 'a person who is nominated in accordance with any regulations made under this Act as a candidate for the election'. That being the case, I do not find this charge made out under s 32(c) of the Act.

[43] Again it is a finding of fact made by the LEJ and we agree with his finding (see also reg 4(3) and 11g of the Elections (Conduct of Elections) Regulations 1981; *Harjit Singh Manu v S Umrao Singh and Ors* AIR 1980 SC 701 at p 706 and *Chandrakauta Goyal v Sohan Singh* AIR 1996 SC 861 at p 862).

[44] As regards the allegation made in para 3(4)(b) of the election petition forming part of the particulars in the charge that the respondent was alleged to have committed an offence under s 4A of the Act the LEJ found that the offence (under s 4A) was clearly outside the ambit of corrupt practice or illegal practice and not within the meaning of s 32(c) (see *Fung Kong Win v Yee Moh Chai* [2005] 3 MLJ 86).

[45] We therefore agree with the LEJ that this charge had not been proved beyond reasonable doubt against the respondent.

Grounds 14–15 (Charge 5) (PW1) (exh P8)

[46] Charge 5 alleged that the pamphlet (exh P8) entitled 'Say enough is enough to SUPP, say 'No' to 'CM' contained misleading imputation against Sim Yaw Yen (BN Candidate) in order to induce or compel the voters to vote for the respondent at the said election.

[47] The evidence of the appellant and the contents of exh P8 adduced by the appellant at the trial was totally unconnected with the charge. Firstly, they did not involve or relate to Sim Yaw Yen at all and secondly they did not concern him as a candidate. The contents of exh P8 was a criticism against SUPP as a political party and a criticism directed at the Chief Minister of Sarawak who was not even a candidate in the 2008 elections.

[48] Having examined the contents of exh P8 and the evidence of the appellant, we agree with the LEJ that exh P8 did not touch on or concern Sim Yaw Yen at all, neither with regard to his public and political activities, nor to his personal conduct and character as a candidate. That being the case, we also agree with the LEJ that the evidence adduced in exh P8 was irrelevant to the charge and could not be acted upon.

[49] We also agree with the LEJ that exh P8 could not have the effect of undue influence on the mind of the appellant or any other voter in P195 in the exercise of their electoral right.

CONCLUSION

[50] The proceedings in an election case being quasi-criminal in character, the burden of proof on the petitioner is a heavy one ie to prove beyond reasonable doubt. In this appeal we are of the view that the LEJ had heard all the evidence before him and seen the demeanour of all the witnesses at the trial and we find that he had considered all the facts very carefully and thoroughly and applied the law and principle correctly. The LEJ had not misdirected himself in law and in fact and his decision is plainly sound. In the premises we find that his findings and conclusion in this appeal should not be interfered with.

[51] The mere fact that the appellate court would have come to a different conclusion after appreciating evidence, is not a ground for interference unless the conclusion of the lower court is so perverse or basically faulty or contrary to law resulting in a miscarriage of justice, which is not the case here.

[52] In *DP Mishra v Kandnarayanan Sharma & Ors* AIR 1971 SC 856 at p 861 (also an election petition) the Supreme Court held as follows:

> We have carefully considered the evidence and the circumstances, and we do not think that a case is made out justifying us in taking a view different from the view of the High Court. The proceeding before us is quasi-criminal in character, and this court will not normally disagree with the view of the High Court, where the High Court has reached, on appreciation of evidence, the conclusion that the corrupt practice charged against a person is not proved. This court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this court may take on the evidence a different view. An appellate court is reluctant to disregard the conclusion on matters of appreciation of evidence by the court which had occasion to watch the demeanour of the witnesses examined before it, and to substitute its own view thereon. Where the proceeding tried by the court of first instance is of quasi-criminal nature the reluctance of the appellate court is greater. The question is not one of power or authority of the appellate court, but

of the respect and consideration due to the court of first instance and of the limit inherent in the exercise of the appellate functions.

[53] In *Election Law* by Rameshwar Dial (With Supp) 1977 at p 141 under the heading 'appealable orders' the writer says:

> Through a first appeal from the order of the election tribunal lay to the High Court and now after 1966 it lies to the Supreme Court and as first appeal the court can legally go both into questions of law and fact and reappreciate the evidence yet, in the matter of election appeals also, settled principles applicable to ordinary civil appeals and principles applicable to criminal appeals where the question of corrupt practice has to be considered have been uniformly followed. The principle is that the High Court or now the Supreme Court will not interfere with the order of the court below except in exceptional circumstances. The grounds on which interference is justified have been stated relying on the same principles. The Supreme Court will not interfere with findings of fact unless the court below has misconceived the evidence or the conclusion is perverse or so basically faulty that interference is attracted or the procedure adopted by the court has resulted in miscarriage of justice or for similar reasons.

[54] In the result we find that the LEJ is right to find that all the charges were not proved beyond reasonable doubt against the respondent and the election petition should be dismissed with costs.

[55] Accordingly, we are unanimous that this appeal be dismissed with costs. Deposit to the respondent to account of taxed costs.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed